No. 83-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Associated General Contractors of America, Inc. (AGC) hereby respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by the Building and Construction Trades Department, AFL-CIO, *et al.* (hereinafter "the Petitioners"), seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 5, 1983. A Petition for Rehearing and Rehearing En Banc was denied on September 16, 1983. Amicus accepts Respondent's Statement of the Case, Statutory

Provisions Involved, and Parties to the Proceedings Below.*

INTEREST OF THE AMICUS

The Associated General Contractors of America, Inc. is a national trade association consisting of 112 state and local chapters. Its 32,000 member firms, including approximately 8,500 of America's leading general contracting firms, operate in the construction industry in the United States and Puerto Rico, and are responsible for the employment of 3.5 million workers.

Construction is the largest industry in the United States, representing approximately 8 percent of the nation's Gross National Product. AGC members perform almost 80 percent of the general contracting construction work performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities and other construction covered by the Davis-Bacon Act.

AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes assistance to courts in their deliberations on significant decisions concerning labor-management relations and labor standards in the construction industry, such as the issues Petitioners seek to bring to this Court.

AGC members include a large number of firms which bid on, negotiate for, and undertake public construction of all types which is subject to the Davis-Bacon Act. Over the years, a major membership service of AGC has been assistance on Davis-Bacon matters, often including issues similar to those contained in the regulations which are the subject of the Petition. Thus, AGC has a strong

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* Pursuant to Sup. Ct. R. 36.1, written consent of the parties to the filing of this brief is submitted herewith.

interest in the lawful and reasonable implementation of the Davis-Bacon Act, particularly since its membership includes contractors who use union labor exclusively, non-union labor exclusively and contractors who use a mix of workers. Each type of contractor is affected differently by the Act. AGC's 52 years of experience with the Act and 65 years in the construction industry place it in a unique position to serve as an *amicus curiae* in this proceeding.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate that the decision of the U.S. Court of Appeals below conflicts with the decision of another such court; or that it departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision; or that the court below decided an important question of federal law which has not been, but should be, decided by this Court, or, contrary to Petitioners' contentions, has decided a federal question in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17(a) & (c), (1980). By these measures alone the Writ should be denied.

The court below correctly selected the proper standard of review for legislative rules and duly applied that well defined standard to the regulations at issue in this case.

1. The Court of Appeals Used the Proper Standard of Review

Section 1(a) of the Davis-Bacon Act, 40 U.S.C. Sec. 276a (hereinafter "the Act"), provides that: "minimum wages to be paid various classes of laborers and mechanics . . . shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed. . . ."

This langauge looks to the Secretary to determine not only the wages which prevail but also the classes of workers for which prevailing wages will be computed. The method and factors to be used in this process, as well as the specific rates, are purely for the Secretary to decide, and a clearer example of delegated power to make legislative rules would be difficult to imagine. The only limitation is the implicit one that the Secretary shall define and implement the concept to serve the statute's fundamental purpose—to ensure that the wages paid on covered construction projects mirror the wages generally paid on similar private construction projects in the area. The key factor is the delegation of ultimate power to determine the content of the law. Professor Davis has stated the standard concisely:

> The "talismanic factor" is whether or not the agency intended to exercise delegated legislative power to make law through rules; if it did, the rule is legislative, and if it did not, the rule is interpretive. That is the only test. Davis, *Administrative Law Treatise*, 2d ed., Sec. 7:15, at 71 (1982).

If the Secretary's authority under the Act had been merely interpretive, as the Trades seem to suggest, the wage rates would have been fixed by the statute subject merely to interpretation and application to particular situations, much like the Secretary's interpretive powers under the Fair Labor Standards Act of 1938. 29 U.S.C. Secs. 201-219 (1976). Such is not the case with Davis-Bacon, and once it becomes clear that the challenged rules are legislative, the standard for review narrows considerably from that used for interpretive rules.

This Court has distinguished interpretive and legislative rules. The force and effect of an interpretive regulation depends, generally speaking, on its power to persuade. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940). A legislative rule, or one with legislative effect, controls

the legal issue unless the rule is beyond the scope of the authority which Congress delegated to the agency, or contrary to Section 706(2)(A) or (C) of the Administrative Procedure Act, 5 U.S.C. Sec. 706(2)(A) (1976). *Batterton v. Francis*, 432 U.S. 416 (1977).[1] Neither such condition exists in the present case.

Correctly perceiving little need for a prolonged discussion of the distinction between interpretive and legislative rules, the Court of Appeals below recognized that *Batterton v. Francis* not only sets for the proper standard of review for the challenged rules, but also fits that standard to the relevant context—where Congress has delegated broad authority to define and implement a key but ambiguous concept, and the agency has then exercised that authority.

In *Batterton*, this Court upheld a regulation which the Secretary of Health, Education, and Welfare had issued pursuant to Section 407(a) of the Social Security Act, 42 U.S.C. § 607(a), which authorizes the Secretary to define "unemployment" for the purposes of the Aid to Families with Dependent Children Program. That section provides:

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this tile, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of paternal support or care by reason of the *unemployment (as determined in accordance with standards prescribed by the Secretary)* of his father, and who is living with

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[1] As they must, Petitioners argue that *Batterton* is not in point. The argument is singularly unpersuasive. The Davis-Bacon Act refers to "wages that will be determined by the Secretary of Labor to be prevailing." 40 U.S.C. § 276a (1976). The Social Security Act issue addressed in *Batterton* refers to . . . "unemployment (as determined in accordance with standards prescribed by the Secretary). . . ." 42 U.S.C. § 607(a) (1976). What is striking is not the difference in the statutory language but the similarity.

> any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or her own) home. 42 U.S.C. § 607(a) [Emphasis added.]

The *Batterton* Court recognized, as did the Court of Appeals below, that where Congress had expressly delegated a measure of its authority and the Secretary had exercised that authority, the resulting legislative regulation could be set aside only under very limited circumstances. Such circumstances, which were not present in either *Batterton* or the present case, would include the Secretary exceeding his statutory authority or the regulation contravening Section 706(2)(A) or (C) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), because arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The two recent cases which so concern the Petitioner, *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, U.S.L.W. 4935 (June 24, 1983), and *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W. 4685 (June 9, 1983), are entirely consistent with the earlier cases already cited, and do not conflict with the decision of the court below. *Motor Vehicle Mfgrs.* has no more than a remote and tangential bearing on the issues which this case presented to the Court of Appeals. *BankAmerica* is wholly inapposite.

Motor Vehicle Mfgrs., cited by Petitioners, is not contrary to the ruling below, and holds only that Section 706(2)(A) and (C) may also apply to an agency's exercise of its delegated authority to *revoke* a legislative rule. The obvious factual differences between that case and the instant one minimize its relevance here. These include the fact that the Davis-Bacon rules were revised, not revoked; that a complete administrative record was developed; that the Secretary carefully analyzed, considered and shaped the revisions in view of years of practical experience with the Act and numerous studies

of the Act; that the Secretary provided logical, rational and reasonable bases for each change (to be discussed *infra*); and that the changes here were neither arbitrary nor capricious.

Motor Vehicle Mfgrs. bears on this case only insofar as the Supreme Court paused to explain the applicable standard of review, but the Court was careful to point out that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id.*, at 4956. The unsurprising essence is that the reviewing court must find "a 'rational connection between the facts found and the choice made.'" *Id., quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Similarly, the Court of Appeals, in deciding this case, cited and relied on *Batterton*, acknowledging that the Davis-Bacon regulations had to be both reasonable and within the authority delegated to the Secretary.

BankAmerica Corp. v. U.S., supra, is the second case relied upon by Petitioners. That decision, however, is wholly inapposite, for it required this Court only to rule on the meaning of a statutory provision. This issue in that case was whether Section 8 of the Clayton Act, 15 U.S.C. Sec. 19, permitted banks and insurance companies to have interlocking directorates. The federal government, changing its historic but informal interpretation, argued that Section 8 prohibits such arrangements. Beginning with the language of the statute, and concluding with a review of its legislative history, this Court held that the petitioners were correct, and that the language of the statute prevailed over a change by the agency of an interpretation. In the language which the Petitioners quote (Petitioners' Brief at 12, 13), the Supreme Court merely applied the well-settled principles going to the weight to be given to an agency's exercise of its inherent authority to interpret the provisions of a statute which the agency has to enforce. The *Bank-*

America Court had no need to address the questions presented to the Court of Appeals below: whether an agency has properly exercised its expressly delegated authority to issue regulations with the force and effect of law.

Petitioners' reliance on *BankAmerica* reveals a great deal. From the outset, the essence of Petitioners' position has been that the Secretary of Labor's power to modify regulations long left on the books was limited by the mere passage of time. Petitioners have asserted the doctrine of contemporaneous and consistent construction, and argue that the modifications are therefore subject to intense scrutiny. Petitioners' insurmountable obstacle is that the principle of contemporaneous and consistent construction goes only to the weight which a court should give to an agency's interpretation of a statutory provision—to an interpretive rule's power to persuade. But when the Secretary issued these challenged regulations, he properly exercised his expressly delegated authority to issue regulations which have the force and effect of law.

Citing both *Motor Vehicles Mfgrs.* and *BankAmerica*, the Petitioners continue to blur the distinction between legislative and interpretive rules. One begins to suspect that in such confusion lies the Petitioners' only hope for success.

2. That Standard of Review Was Correctly Applied

The court below carefully applied the applicable *Batterton v. Francis* and APA standards of review to the legislative regulations at issue in this proceeding. That court properly found that the Secretary's choices, except as to those portions the court failed to uphold,[2] were

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[2] The court below ruled against the Secretary that helpers must prevail in an area and that weekly wage data must be submitted by contractors doing work covered by the Act.

within the broad discretion and authority conferred upon the Secretary by the Act, were rational and consistent with the statute, and were not arbitrary, capricious or otherwise not in accordance with law. 5 U.S.C. § 706 (2) (A) (1976). It properly reversed the District Court which erroneously viewed the regulations as interpretative and thus subject to a much different standard of review than the one appropriate to this proceeding. Thus, while the fact that rules are longstanding or contemporaneous with enactment of the statute may be important for the review of interpretive rules, these factors are irrelevant as to properly developed legislative rules such as those at issue here.

Properly recognizing that the language of the Act "in the broadest terms imaginable" [3] gives the Secretary power to determine the wages prevailing for various classes of workers, the court below found additional support for the Secretary's power to eliminate the 30 percent rule [4] in the legislative history and the lack of any indication that Congress intended to bind the Secretary to that rule forever. The Secretary's decision to alter a regulatory scheme which labeled as "prevailing" a rate not paid up to 70 percent of craft workers in an area certainly was logical and reasonable. It also was supported by studies done by the General Accounting Office and Oregon State University demonstrating that the rule caused wage distortion (i.e., did not reflect locally prevailing wages) and tended to pick up union wage rates

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[3] *Building and Construction Trades Dept., AFL-CIO et al.* v. *Raymond J. Donovan et al.*, 712 F. 2d 611 (D.C. Cir. 1973) reprinted in Petitioner's Appendix, hereinafter Pet. App., at 9a.

[4] Under the previous regulations, if a majority of workers in a craft in an area did not receive the same wage rate, the Department of Labor used a rate paid to at least 30 percent of those workers, or if 30 percent did not get the same rate, it used a weighted average. The revised regulations deleted the 30 percent rule but retained the other two methods. *See* 47 Fed. Reg. 23652 (Part 1.2a) (1982).

which typically are more uniform than open shop (non-union) rates.[5] Keeping the majority rate as the primary method for determining prevailing rates, as well as retaining the weighted average where 50 percent of workers did not receive the same wage, the Secretary relied on his expertise in dealing with the disruptive effects of the 30 percent rule by deleting it. Such a decision accords with the language and intent of the Act, as well as *Batterton v. Francis* and the Administrative Procedure Act.

Since the Secretary has been delegated by statute the authority to determine the prevailing wage, a corollary is that he has to decide what wage data will be collected, and from which areas, to compute that wage. Thus, he could restrict use of wage data from Davis-Bacon projects and could limit importation of wage data from urban to rural areas. The court below observed that the Act's legislative history demonstrates that the phrase "projects of a character similar" was intended to equate federal construction wages with those in private industry, since it was the federal competitive bidding requirement which had forced contractors to compete on the basis of wages prior to the enactment of the Act. (Pet. App. at 17a-18a). Thus, it would have made no sense to *require* the Secretary to survey federal projects, although the statutory language is broad enough to allow him to do so if the choice were made.

The revised regulations restrict use of Davis-Bacon project data only where private residential and building construction in the area is sufficient for developing the predetermined wage. 47 Fed. Reg. 23652, (Par 1.3(d)) (1982). Davis-Bacon highway and heavy projects will

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[5] General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, 51-53 (April 27, 1979). Oregon State University, *Effect of the Davis-Bacon Act on Construction Costs in Non-Metropolitan Areas of the United States*, 2 (1982). *See* 47 Fed. Reg. 23644-5 (May 28, 1982).

continue to be part of the Davis-Bacon data base for those types of construction. Thus, the Secretary carefully structured his revisions to meet the statutory objective of reflecting rates in private industry while avoiding a wage spiral resulting from inclusion of high wage public projects. See 47 Fed. Reg. 23645 (May 28, 1982).

For a similar reason, the court below upheld the strengthened limitations on importation of wage data from urban to rural areas in Part Sec. 1.7(b) of the regulations. The Secretary reasonably believed that wage importation caused wage distortion, contrary to the objectives of the Act to reflect local rates, since urban rates tend to be higher than rural rates. (See 46 Fed. Reg. 41,445 (1981) (Proposed rulemaking) and 47 Fed. Reg. 23647 (1982). Moreover, he found that federal project wages based on imported urban wage rates disrupted rural labor relations in the private sector. *Id.* In fact, the Secretary was merely doing what the Act intended: revising the legislative regulations to implement changes he felt necessary to reach statutory goals based on the Department of Labor's experience with performance of the previous rules.

In affirming the Secretary's clarification on the use of helpers[6] on covered projects in 47 Fed. Reg. 23667 (5.5 (n)(4)(1982), the court below found that changing the basis of the helper classification from tasks done to one of supervision by a journeyman was both logical and within the Secretary's statutory discretion. Moreover, the court recognized that since the Secretary has the power to determine wage rates for various classifications, he also must have the ability to decide the classifications themselves. (Pet. App. at 35a)

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[6] Helpers are semiskilled construction workers who are neither journeymen nor apprentices or trainees. *See* 47 Fed. Reg. 23659 (Part 5.2(a)(4) (1982). Helpers are allowed on Davis-Bacon projects with certain limitations under present rules. *See* 47 Fed. Reg. 23,647 and 23,659 (1982).

The legislative history, the court found, focused on Congress' desire to carry local practices into federal work. Since a solely task-based definition would be contrary to prevailing local labor practice in many areas (See 47 Fed. Reg. 23,647, 23,662 (1982)), with the changes the Secretary reasonably sought to bring federal labor rules more closely into alignment with those common on private work.[7] The rules would not permit helpers in areas where they would be contrary to local practice, since the court below specifically ruled that the classification must be prevailing in order to be used.[8] To guard against misuse of helpers, the Secretary provided that helpers would receive journeyman rates if they performed journeyman work. 47 Fed. Reg. 23670 (Part 5.5(a)(4)(iv)(1982). In addition, helpers were limited to 40 percent of craft workers on site, a consideration the Court below found not to be as desirable as a ratio based on local practice, but which was relevant to the Secretary's view of enforcement of the new rules. (Pet. App. at 39a)

Measured by the correct standard of review, the revised regulations were found by the court below to be a reasonable and rational exercise of the Secretary's statutory discretion under the Act.

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[7] The Secretary's finding that the use of helpers in private construction was widespread is confirmed by extension of the helper concept even by unions. *See* Engineering News-Record, *Unions Battle Domination With Wage Concessions*, 59 (January 27, 1983).

[8] The Secretary sought to allow helpers where they were "identifiable." *See* 47 Fed. Reg. 23655 (Part 1.7(d)) (1982).

CONCLUSION

The record demonstrates that the court below correctly concluded that the revised regulations were within the legislative authority and discretion of the Secretary, and were not arbitrary or capricious or otherwise not in accordance with law. For this reason, Amicus AGC respectfully requests that the Petition be denied.

Respectfully submitted,

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